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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 217.

MIDLAND REALTY COMPANY, APPELLANT,

VS.

KANSAS CITY POWER & LIGHT COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

I.

The decision of the Supreme Court of Missouri, appealed from, is reported as *Kansas City Light & Power Co.* v. *Midland Rea'ty Co.*, 93 S. W. (2d) 954. It is not yet reported in the Missouri state reports.

The Supreme Court sits in two divisions and, under certain circumstances, as the court "*in banc.*" The decision of a case assigned to a division is that of the Su-

preme Court of Missouri. This case was assigned to Division No. 1. After an adverse decision therein the appellant here moved to have the case transferred to the court *in banc*, which was denied (Rec. 17). The decision herein rendered and appealed from is that of the highest court of the state. The judgment rendered was as follows:

> "The judgment of the circuit court is reversed and the cause remanded with directions to enter judgment for the plaintiff on all counts of the petition as prayed therein" (Rec. 15, 17).

That is a final judgment from which appeal lies to this court.

Mower v. *Fletcher*, 114 U. S. 127.
Georgia Ry. & Power Co. v. *Decatur*, 262 U. S. 432.
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II.

Appellant has heretofore filed in this court a statement as to jurisdiction, in accordance with Paragraph 1 of Rule 12, and the court has thereupon made the order, "probable jurisdiction noted."

III.

STATEMENT.

The contract which is here in question was made between appellant and Kansas City Heating Company. It is alleged, and agreed, that appellee, Kansas City Power & Light Co., succeeded to all the rights and obligations

of said heating company under said contract. We will, therefore, treat the contract as if made, originally, by appellee.

On February 27, 1908, appellant entered into a contract (Rec. 47) with appellee herein for steam heating service at the rates therein named for a term of five years, beginning September 1, 1908, with the option in appellant to extend the same for an additional five years, which option was duly exercised (Rec. 52). Appellee furnished steam heat to appellant during the whole ten-year term of said contract and appellant paid in full, according to the contract, for said service.

In the year 1913 there was enacted what is known as the Public Service Commission Law of Missouri (Chapter 33, Revised Statutes of Missouri, 1929). On June 19, 1917, appellee filed with the Public Service Commission a schedule of rates (Rec. 45) for steam heat service. The commission made no finding of order whatsoever, at that time, with respect to said rate schedule. It was merely filed. The rates named in that schedule were higher than the rates provided in said contract. Said schedule of rates were filed by virtue of Paragraph 12 of Section 5190, Revised Statutes of Missouri, 1929, Vol. I, page 1448, which enumerates certain powers of the commission, the pertinent part of which is as follows:

> "Have power to require every gas corporation, electrical corporation, water corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced. * * * Unless the commis-

> sion otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. * * * No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; * * *"

Shortly thereafter a complaint was lodged with the commission against such filed schedule of heating rates by certain heat customers (not including appellant) and, after a hearing, the commission, on February 11, 1918, made a finding and order setting aside the said filed schedule of rates as being unreasonable, excessive and unlawful. The commission, at the same time, promulgated a schedule of heating rates, effective March 1, 1918, for appellee's heat customers generally, in which the named rates were somewhat higher than those named in appellant's contract, aforesaid. Said finding and order of the commission is found in its officially published reports (5 Mo. P. S. C. Rep. 664-683).

Said schedule of rates was promulgated by the commission by authority of Paragraph 5 of Section 5190, Re-

vised Statutes of Missouri, 1929, Vol. I, page 1446, which is as follows:

> "* * * Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished. * * *"

The statutes above quoted mention only gas and electrical and water companies but were made applicable to heating companies by Section 5228, Revised Statutes of Missouri, 1929.

No complaint was made by appellee or other party concerning appellant's said contract before said commission or otherwise, and no finding or order was ever made with respect thereto by the commission. On the contrary, appellee continued to render heating service to appellant and appellant continued to pay for the same, in accordance with the contract, throughout the full term of the contract. That is to say, the contract was fully performed on both sides.

About three years after the contract had expired, according to its terms, and had been fully performed, that is, on August 27, 1921, appellee instituted this suit against the appellant in the Circuit Court of Jackson County, Missouri. In the first five counts of its petition herein appellee seeks to recover of appellant the difference between what appellant paid, according to contract, for heat-

ing service in the months of October, November and December, 1917, and January and February, 1918, and what appellee claims that appellant should have paid according to said schedule which was merely filed, and, later, was annulled by the commission as aforesaid. Appellee seeks to recover, in the last six counts of its petition herein, the difference between what appellant paid, according to contract from March 1 to August 31, 1918, and what appellee claims that appellant should have paid, according to said schedule, which was put into effect by the commission as of March 1, 1918 (Rec. 45, 46, 5 Mo. P. S. C. Rep. 683).

The case was tried before the court without a jury. The appellant, in its answer (Rec. 33) and by requested declarations of law (Rec. 53-58) in the trial court, contended that the provisions of said Public Service Commission law so construed and applied as to abrogate and render nugatory its said contract, which was fully performed, without any hearing or finding or order having been had or made by the commission or other tribunal with respect to said contract, violated and were repugnant to Section 10, Article I of the Constitution of the United States, which provides that no state shall pass any law which impairs the obligations of contracts, and violates the Fourteenth Amendment to said Constitution, which prohibits the taking of one's property without due process of law.

The decision of the trial court was in favor of defendant (appellant here) on the first five counts of the petition, and against it on the last six counts. Plaintiff

and defendant duly perfected cross appeals to the Supreme Court of Missouri.

The decision of the Supreme Court of Missouri was against defendant (appellant here) on all counts of the petition, that is, the decision of said court was against the constitutional contentions of appellant, and in favor of the validity of said statutes as so construed and applied. For the decision of said court see *K. C. P. & L. Co.* v. *Midland Realty Co.*, 93 S. W. (2d) 954 (Rec. 4-15).

IV.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The assigned errors intended to be urged may be summarized thus:

(a) The Supreme Court of Missouri erred in denying appellant's contention that to give the statute, known as the Public Service Commission Law of Missouri (Chapter 33, R. S. Mo., 1929), such force and effect that the mere filing of schedule of rates, thereunder, by appellee, a public utility company, served to abrogate the contract which appellant had for appellee's heating service, without any finding or order having been made by the Public Service Commission with reference either to such filed schedule or to appellant's contract, renders said statute repugnant to the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, and repugnant to Section 10 of Article I

of said Constitution, which provides that no state shall pass any law which impairs the obligation of contracts.

(b) The Missouri Supreme Court erred in denying appellant's contention that to give said state statute such force and effect that the mere promulgation of a schedule of rates for appellee's steam heat customers, generally, by the Public Service Commission, pursuant to the statute, served to abrogate appellant's contract with appellee for its steam heat service, although no finding or order was made by the commission with reference to said contract, and although said contract was in due time fully performed, on both sides, renders said statute repugnant to the Fourteenth Amendment to the Constitution of the United States which provides that no state shall take any person's property without due process of law, and repugnant to Section 10 of Article I of said Constitution which provides that no state shall pass any law which impairs the obligation of contracts.

(c) The contract in question was fully performed, on both sides, without let or hindrance. All rights thereunder became vested rights, prior to the institution of this suit. The judgment herein of the Missouri Supreme Court, under said circumstances, to the effect that appellant, having fully paid, according to the contract, for the service which it received solely by virtue of the contract, must yet pay more for the service than the contract required, is the taking of appellant's vested property rights without compensation and without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

V.

SUMMARY OF THE ARGUMENT.

(a) To hold that the mere enactment of the Public Service Commission Law of Missouri, or the mere *ex parte* act of a utility company, appellee, in filing a schedule of rates thereunder, served to abrogate appellant's contract with appellee for heating service, although the Public Service Commission made no finding or order with respect to said rate schedule, when filed, and made no finding or order with respect to appellant's contract, would render said statute repugnant to the contract impairment and the due process of law provisions of the Federal Constitution.

(b) To hold that the promulgation by the commission of a schedule of heating rates, for appellee's customers, generally, upon a hearing of which appellant was given no notice, and to which it was not a party, and in which its contract was not considered or referred to, served to abrogate appellant's contract for heating service, although it was thereafter performed, would be violative of both the contract impairment and the due process of law provisions of the Federal Constitution. Upon said hearing the commission not only made no finding that appellant's contract was unreasonable, as to it, and under the peculiar circumstances of the service to it, or that appellee should be relieved from its performance, in the interest of the public welfare, but there is neither allegation nor proof that the commission's said schedule was intended to supplant appellant's contract. And ap-

pellee proceeded to fully perform the contract, and to receive pay from appellant, according to the contract. Appellant's responsibility to pay for the service to one building, which it did not own, rested entirely upon the contract.

(c) If, as appellant contends, the legislature, by the Public Service Commission Law, did not authorize, but rather inhibited the abrogation of the contract in question, the judgment of the Missouri Supreme Court that appellant pay more than the contract required, for the service rendered solely by virtue of the contract, serves to take appellant's property without compensation, *i. e.*, without due process of law.

VI.

ARGUMENT.

A.

We desire that it be understood that this case does not present the proposition, heretofore so thoroughly settled, that the state did not have the right to abrogate a private contract with a public utility company which was entered into prior to the enactment of the Public Service Commission Law of Missouri. The proposition here is, rather, that the contract in question was not abrogated; that what was here done by the state, or its agencies, cannot be said to have sufficed to abrogate the contract in question, against the claim of protection under the Federal Constitution.

It should be further noted, at the outset, that this is not a suit in equity whereby a utility's customer is seeking to have the utility perform its contract, nor whereby the utility is seeking to be relieved from performing a contract, as detrimental to the public interest or for other reason. It is an ordinary suit at law whereby plaintiff, appellee here, after it had performed its contract, and had received full pay in accordance with the contract, seeks to recover yet more for the service which it rendered pursuant to the contract.

In 1908, when appellant made the contract in controversy, for heating service, there was no public utility or public service commission law of Missouri which af-

fected contracts between utility companies and their customers. The contract was a valid and permissible one, when made, and continued to be such, throughout its term, unless it was abrogated, in a lawful manner, by the state, in the proper exercise of its police power.

Wichita R. & L. Co. v. *P. U. Comm.*, 260 U. S. 48.
Hinkel D. G. Co. v. *Wich. Ind. Gas Co.*, 64 F. (2d) 881 (C. C. A. 10th).

In 1913 the legislature enacted what is designated as the "Public Service Commission Law of Missouri" (Chapter 33, Rev. Stat. Mo., 1929). By that act the legislature created the Public Service Commission and delegated to it the power to regulate and control public utilities and the rates to be charged for their services in the manner and to the extent prescribed by that statute. In June, 1917, appellee filed with the Public Service Commission a schedule of rates for its heating service (Rec. 45). The commission was not then asked to and did not make any finding or order whatsoever with respect to said filed schedule. Upon the face of the schedule, August 1, 1917, was named as its effective date. Appellee contends that inasmuch as said schedule was not suspended by the commission, nor any complaint lodged against it, prior to its named effective date, it then went into full force and effect; that it not only superseded prior rates for its customers, generally, that is, who had no special contracts, but that it served even to abrogate appellee's contract here in question. Appellee contends that the Public Service Commission Law (Par. 12, Sec. 5190, R. S. Mo., 1929, Vol. I, p. 1448) gave such effect

to said filed schedule. The pertinent part of said section has been set forth in the "Statement" (*ante*, pp. 3-4). The Supreme Court of Missouri upheld such contention, saying that "We hold that the contract in controversy should be deemed nugatory from and after August 31, 1917" (93 S. W. (2d) l. c. 961) (Rec. 15). That was the date named in said filed schedule as its effective date. Notwithstanding the filing of said schedule of rates appellee continued to render to appellant the heating service prescribed in said contract, and appellant continued to pay therefor, at the rates prescribed in the contract, until the contract expired by its terms, viz., on August 31, 1918. More than three years after the contract had expired, and had been fully performed, that is, on August 27, 1921, appellee instituted this suit against appellant. In the first five counts of the petition appellee seeks to recover the difference between what appellant actually paid, according to contract, and what appellee now claims that appellant should have paid, according to said filed schedule, for steam heat service from October 1, 1917, to February 28, 1918.

It has heretofore been noted that the commission made no finding or order with respect to said rate schedule, at the time it was filed. However, shortly after August 1, 1917, named as the effective date of said schedule, a number of appellee's heating customers (not including appellant) lodged a complaint against said filed schedule before the Public Service Commission. The commission had a hearing upon said complaint with the result that the commission made a finding and order that said schedule of rates was unreasonable, excessive and unlawful.

Said decision and finding of the commission was offered in evidence (Rec. 45, 46) but is not set out in the record herein, as it was stipulated that reference might be made therefor to the official reports of the commission, published as required by law (5 Mo. P. S. C. Rep. 664-683). That finding and decision of the commission was not appealed from, but was accepted and conformed to by appellee, that is, it became "final." The Public Service Commission Law provides that:

> "In all collateral actions and proceedings the orders and decisions of the commission which have become final shall be conclusive" (Sec. 5238, R. S. Mo., 1929, Vol. I, p. 1476).

Plaintiff (appellee) is, therefore, in the peculiar position of endeavoring to collect money from defendant, in counts one to five of its petition herein, by virtue of a schedule of rates which was *conclusively* established, as regards this collateral action, to be unreasonable, excessive and, therefore, unlawful, according to said plain statutory provision.

Neither appellee nor the Missouri Supreme Court question but what it was proper for the legislature to make the commission a fact finding body as to utility rates, and to make conclusive any finding which had become final, that is, from which no appeal to the courts had been taken as provided by the statute. But the Missouri Supreme Court sought to escape the effect of the statute just above quoted by noting that the Public Service Commission, in its decision upon a hearing, had after the contract in controversy had expired, as

to both steam heat and electricity rates in Kansas City (8 Mo. P. S. C. Rep. 223), had indicated, as the court deemed, that the commission as composed in 1917, had erroneously found, by reason of insufficient data before it, that said schedule of heating rates, filed in 1917, was unreasonable and excessive. As to that later decision of the commission several observations are pertinent. First, what was said in said decision was said *arguendo,* in its opinion, and not in the commission's findings or orders. The latter are found on pages 297-300 of 8 Mo. P. S. C. Reports. It is findings or orders of the commission which the statute makes conclusive, and not what the commission may say, argumentatively, in an opinion. Second, the said rate schedule, filed in 1917, was not before the commission, for consideration, at the time said later decision was rendered, and the commission made no *finding* concerning it. In the next place, the commission, as then composed, could not, if it would, nullify a finding of fact made by the commission, as composed in 1917, which finding, by virtue of the statute, had become final and conclusive, in a collateral proceeding, such as the case at bar. It might as well be argued that when a court overrules one of its former decisions it thereby nullifies the judgment in the former case, although such judgment had become final.

However, appellant does not, in this court, base its case mainly, if at all, upon the conclusive finding of fact by the commission that said schedule of rates, merely filed as aforesaid, was unreasonable and unlawful. Appellant relies, rather, upon the broader ground that to give said statute (Section 5190, R. S. Mo., 1929, Vol. I, p. 1448)

such force and effect that appellee's mere *ex parte* act of filing a schedule of heating rates, applicable to its customers, generally, served to abrogate appellant's contract, although the commission, at the time, made no finding or order with respect to said schedule, nor any finding or order with respect to appellant's contract, renders said statute repugnant to both the due process of law clause and the contract impairment provisions of the Federal Constitution.

Let it be noted that appellee never lodged any complaint before the Public Service Commission with respect to appellant's contract in question. It never sought to be relieved, by the commission, from the performance thereof, as being inimical to the public welfare, or for any reason. On the contrary, it continued to perform the contract throughout its full term, and appellant made full payment, according to contract, for the service rendered.

Another noteworthy fact is that appellant did not own all of the buildings to which heating service was rendered under this contract. The contract shows on its face (Rec. 48) that one, at least, of the buildings was owned by another party, the appellant being merely the managerial agent thereof. So, appellant was not obligated to pay for heating service to that building except by virtue of the contract in question. But, appellee continued to send steam heat to that building, as a service to appellant; continued to bill appellant for that service; continued to accept payment from appellant for that service; and continues, by this suit, to assert responsibility in appellant to pay for such service, when its responsibility, if any,

to pay rests solely upon said contract. Appellee now seeks to say that the contract was annulled as to it, but kept alive as to appellant.

The decision of the Missouri Supreme Court was: "* * * we hold that the contract in controversy should be deemed nugatory from and after August 31, 1917" (93 S. W. (2d) l. c. 961). (Rec. 15). That was the named effective date of said rate schedule which was filed with the commission on June 19, 1917 (Rec. 45), which the commission made no finding or order concerning, when filed, but which the commission later, upon a hearing, found to be unreasonable, excessive and unlawful (5 Mo. P. S. C. Rep. 664-683).

Said rate schedule was filed by virtue of Par. 12, Section 5190, R. S. Mo., 1929, the pertinent part of which has been set forth in the "Statement" herein (*ante*, pp. 3-4).

That the mere enactment of that statute, or the mere filing, thereunder, of a schedule of rates, for customers, generally, could not have the effect of abrogating appellant's contract, in the absence of any finding or order of the commission, upon an orderly hearing, with respect to the filed schedule or with respect to the contract, in view of the contract impairment and the due process of law provisions of the constitution, has been definitely settled by the authoritative decisions of this and other courts.

Wichita R. & L. Co. v. *P. U. Comm.*, 260 U. S. 48.

Hinkel D. G. Co. v. *Wichison Ind. Gas Co.*, 64 F. (2d) 881 (C. C. A.).

Attleboro Steam & El. Co. v. *Narragansett El. Light Co.*, 295 F. 895.

In re Searsport Water Co., 118 Me. 382 (108 A. 452, 458).

Kaul v. *Am. Ind. Tel. Co.*, 95 Kan. 1 (147 P. 1130).

So. Utilities Co. v. *Palatka*, 268 U. S. 232.

Jefferson Deposit Co. v. *Central Ill. Light Co.*, 309 Ill. 262; 140 N. E. 817.

In the case of *Wichita Rd. & Light Co.* v. *Public Utilities Comm. of Kansas*, 260 U. S. 48, above cited, a utility company had a private contract as to rates with a certain consumer. The company filed a schedule of rates with the utility commission, higher than such contract rates, and petitioned the commission for an order putting into effect such schedule, as to all consumers. The commission, after a hearing in which the consumer, having the contract, intervened, allowed the petition and ordered that the filed schedule go into effect. The consumer having said contract, brought suit in the federal court to enjoin the commission from putting the order and schedule into effect as to it, asserting protection of its contract under the Federal Constitution. It was urged that the order made by the commission was not effective to put the schedule in effect, in lieu of the contract rates, because the commission did not make a direct finding that the contract rates were unreasonable, as to the contract customer. The utility company fell back upon the contention that the mere filing of the schedule with the commission was sufficient, under Section 20 of the Kansas Public Utility Act, to put the schedule in effect in abrogation of

the contract rates, without any finding by the commission. The court denied that contention, and held that the mere passage of the Public Utility Act, or the mere filing, thereunder, of a rate schedule was not sufficient to abrogate a contract.

If the suggestion be made that said decision was based upon the peculiar statutes of Kansas, there are at least two answers thereto. In the first place, the sections of the Kansas statute, referred to in the court's opinion, are strikingly similar in language, and identical in substance, with the corresponding sections of the Missouri Public Service Commission Act, to-wit, Sections 5190 (5) and (12), 5191, 5230 and 5231, Rev. Stat. Mo., 1929. In the second place, this court made it very clear that its decision, in said Wichita case, was not based particularly upon the Kansas statutes, but upon principles of constitutional law. In the opinion, the court said:

> "This conclusion accords with the construction put upon similar statutes in other cases (citing cases). Moreover, it accords with general principles of constitutional government."

In the later cases of *Mahler v. Eby*, 264 U. S. 32, and *Panama Refining Co. v. Ryan*, 293 U. S. 447 (1934), the court refers to said Wichita case and reiterates that "We put this conclusion not only on the language in the statute, but also on principles of constitutional government."

In the case of *In re Searsport Water Co., supra*, the Maine Supreme Court says:

> "A utility cannot repudiate such a contract at will. Nor does the filing of new schedules under

Section 28 have the effect of changing the rates fixed by contract. To obtain a change in such rates, except, of course, by mutual consent, and with approval of the Utilities Commission, the utility should proceed under Section 50 of Chapter 55, and first obtain a finding by the Utilities Commission that the rates and charges fixed in such contract are 'unjust, unreasonable or insufficient,' whereupon the commission may then substitute such rates as it shall deem to be just and reasonable in the premises."

In the case of *Jefferson Deposit Co.* v. *Central Ill. Light Co.*, 309 Ill. 262, 140 N. E. 817, the Supreme Court of Illinois says:

"It is apparent from the record that the appellee has never filed complaint or petition alleging that its contract with the appellant is unjust, unreasonable, or discriminatory. While it is true that it is stated in its notice concerning its petition to withdraw its flat-rate schedule that it desired to put all steam consumers on a meter basis, and while the order of the commission allowing the withdrawal of the flat-rate schedule states that all consumers of steam shall be put on a meter rate basis, yet it is apparent from the petition and the proceedings before the commission that no consumers were contemplated other than those on a flat-rate schedule, which rate was determined by the number of square feet in the building in which the steam was used. Such basis of rate has no reference to or bearing on the appellant's contract, which is a lump sum contract. No evidence was offered on either of the appellee's petitions that in the slightest degree touched on the question of the reasonableness of the appellant's contract or whether or not it was discriminatory. * * * It is not within the legal contemplation of the Public Utilities Act that contracts may be set aside by inference, nor that the commission shall have power to do so as an incident to a proceeding on a petition

seeking a different relief. The petition of the appellee and its position taken before the commission were that it be allowed to withdraw its flat-rate schedule. Its notice to the public that it desired to put all steam users on a meter basis was based on its petition to withdraw its flat-rate schedule, and was not such as required the appearance and objection of the appellant, for the reason that its contract was not on a flat-rate basis. While the order of October 30, 1918, made by the commission, temporarily increased meter rates and in terms was made applicable to all consumers of steam in the City of Peoria, it is clear that, if the words 'all consumers' were intended to cover other than meter or flat-rate consumers, the order in that particular was void, as the commission had no authority to make its order applicable to consumers who held contracts under the nonschedule rate filed, unless there had been a hearing and finding that the appellant's contract was unjust and unreasonable by the proceeding provided for by the act. While the intention of the act is to prevent discrimination in rate charges, it provides the method by which contracts may be abrogated, and their validity cannot be attacked in any other way. Such contracts were not, as contended by the appellee, destroyed by the passage of the act. At the time the appellant filed its complaint for reparations its contract had not been abrogated."

We may concede that the contract in controversy was entered into subject to the right of the state to abrogate it, in a lawful manner, if it should be found, on a hearing before a competent tribunal, that the performance of it would be inimical to the public welfare. The contract, although subject to the condition of being abrogated, as aforesaid, was a property right which could not rightfully be taken away without due process of law. And the very essence of due process is notice and a hearing.

Both were conspicuously absent in the present instance. In the opinion in this case the Missouri Supreme Court said:

> "Under the construction our court has placed upon our statute authorizing substituted rates for existing rates, the statute does not require any finding of facts or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917" (93 S. W. (2d) l. c. 960, Rec. 13).

If said court has correctly construed said statute there can be no question, we submit, but that the statute undertakes to abrogate contracts, to take away property rights, without due process of law. Such is the express holding of this court, in the *Wichita Case, supra,* of the Circuit Court of Appeals, Tenth Circuit, in the *Hinkel Dry Goods Co: Case, supra,* and of other courts, in the cases hereinabove cited.

B.

What has been said in the preceding point of this argument pertains, in the main, to counts one to five of appellee's petition herein, wherein it seeks to recover by reason of the rate schedule which it filed with the commission in June, 1917. When the commission, on February 11, 1918, found, after a hearing upon a complaint filed, that said schedule of heating rates was unreasonable, excessive and unlawful, the commission, itself, then promulgated a schedule of rates for heating service, effective March 1, 1918 (Rec. 45, 46, 5 Mo. P. S. C. Rep. l. c. 683). In the last six counts of its petition appellee seeks to recover the difference between what appellant paid, ac-

cording to contract, and what appellee now claims that appellant should have paid, according to the commission's said schedule, from March 1 to August 31, 1918.

Appellant was not a party to the proceeding before the commission, just mentioned. Its contract here in question was not considered or referred to in that proceeding (5 Mo. P. S. C. Rep. 664-683). There is neither allegation nor proof, in the case at bar, that said schedule of rates, promulgated by the commission, purported to or was intended to cancel appellant's said contract. Appellee did not ask the commission to inquire concerning appellant's contract, to find whether or not it was unreasonable or subvertive of the public interest, or to order that appellee desist from furnishing heat to appellant in accordance with the contract. On the contrary, appellee continued to furnish heat to appellant until the contract expired by its terms, and appellant paid therefor in full, according to contract.

Certain it is that there was never any finding by the commission, the only tribunal which was competent to make such a finding, that the performance of this contract was or would be detrimental to the public welfare. And there is neither allegation nor proof, in the case at bar, that appellee was required to or did falter, in the least, in rendering its service to the general public by reason of the fact that it was performing appellant's contract, and was being paid only in accordance with its terms. The contract was performed, and there is nothing in the record here which indicates that the public interest was injuriously affected

thereby. If appellee should recover in this case there is no reason to believe that it would distribute the amount of its recovery among the public or among those who were its steam heat customers during the time in question.

Injury to the public welfare is a *sine qua non* for the abrogation of such a contract by a state.

Arkansas Nat. Gas Co. v. *Ark. Rd. Comm.*, 261 U. S. 379.

Ohio & Colo. Smelt. & R. Co. v. *P. U. Comm.*, 68 Colo. 137; 187 P. 1082.

In the first case above cited, this court said:

> "The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. *Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the constitution.* The power does not exist *per se.* It is the intervention of the *public interest* which justifies, and at the same time, *conditions, its exercise*" (italics ours).

In the well-considered case, last above cited, the Supreme Court of Colorado says:

> "The *sole reason* for holding that the power rests with the commission to increase or decrease a rate stipulated in a contract, and that the exercise of such a power is not an infringement of the constitutional inhibition against the impairment of a contract obligation, and likewise the guarantee of due process of law, is that the *public welfare* demands it in the specific case. Therefore the *commission,* with the delegated legislative power of the state, *must determine that the rate fixed in the contract is detrimental to the public weal.* This is the exercise of a

very grave and dangerous power, and should be asserted with the greatest caution, and by means of every instrumentality at the command of the commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare. It is not as if the commission were to establish a rate in the first instance, as based upon its own judgment as to reasonableness, but it *must first determine* that a contract in this respect, between persons engaged in the particular business and presumably well advised as to its probable effect, not only at the time, but in the light of future conditions, is so unreasonable as to be *detrimental to the public interest*'' (italics ours).

If appellee considered that, for any valid reason, it should not perform this contract it should have made complaint thereof to the Public Service Commission, and had a hearing and finding in regard thereto. But there is no evidence that this contract was even filed with the commission, or otherwise brought to its attention. As the contract was being performed the appellant herein certainly had no reason to appear before the commission with reference thereto.

It has heretofore been noted that appellant did not own one of the buildings for which steam heat service was furnished under this contract, as appears from the face of the contract (Rec. 48). Nothing in the record here indicates that appellant was obligated to take or to pay for heating service to said building except by virtue of said contract. It never ordered nor requested the service except by the contract. Nothing in the record indicates that appellant requested such service, under the schedule in question, or that it obligated itself to pay for heat furnished that build-

ing by reason of or at the rates fixed by the commission, in the schedule which it put into effect. If the promulgation of that schedule abrogated the contract in controversy, then appellant's responsibility to pay for heat, at least for said building, ceased. In prosecuting this suit the appellee is seeking to hold appellant responsible under the contract, as if in force, while it maintains that the contract was annulled as to itself. If appellee had procured the abrogation of this contract, in a lawful way, who can say that appellant would have continued to take and to make itself responsible for heat for the building which was owned by Laura Minor (Rec. 48)? Or, who can say that either Laura Minor or appellant would have taken steam heating service, for their respective buildings, from appellee, if they had been required to pay at the rates fixed in the schedule promulgated by the commission?

In enacting the Public Service Commission Law of Missouri the legislature did not undertake to itself abrogate private contracts with public utility companies. The legislature merely delegated to a commission the power to deal therewith. The commission, rather than the courts, was given the power to make all findings of fact with respect to all public utility rates.

Cape Girardeau v. *St. L., etc., R. Co.*, 305 Mo. 590, 605.

N. P. Ry. Co. v. *Solum*, 247 U. S. 477, 484.

It was for the Public Service Commission to find the question of fact as to whether or not the rates

prescribed in the contract here in question, for the particular service to be rendered appellant, were so unreasonable as to be detrimental to the public welfare. But the commission did not make such a finding, and could not lawfully make such a finding of fact except upon a hearing, upon notice, with respect to the contract.

To say that the commission was authorized to make a finding and order to that effect, without an orderly procedure, that is, without notice and a hearing, would render invalid the Public Service Commission Law, as being a pure delegation of legislative power.

Wichita Rd. & L. Co. v. *P. U. C.*, 260 U. S. l. c. 59.

It may be urged that the commission did have a hearing, and did decide, upon a hearing, that the heating rates prescribed in its schedule promulgated on February 11, 1918, effective March 1, 1918 (Rec. 46, 5 Mo. P. S. C. Rep. 683), were reasonable and proper; that such rates were higher than those prescribed in the contract in question; that, therefore, the commission found, by implication, that the contract rates were not reasonable and proper.

Against that suggestion we say, first, that this court, in the *Wichita Rd. & L. Co. Case, supra,* l. c. 59, held that a finding by implication was insufficient, in such a matter. The decision in *Jefferson Deposit Co.* v. *Central Ill. Light Co.*, 309 Ill. 262, 140 N. E. 817, is to the same effect. In that case the court says:

> "It is not within the legal contemplation of the Public Utilities Act that contracts may be set aside by inference, nor that the commission shall have power to do so as an incident to a proceeding on a petition seeking different relief."

In the second place, the finding was not binding upon appellant, who had no notice of and was not a party to that hearing. Thirdly, from the finding that a certain schedule of rates was reasonable, as to the utility company and its customers, generally, it did not follow that appellant's contract rates were unreasonable, as to it, or so much so that the performance of the contract would be injurious to the public welfare.

We submit that, under the circumstances disclosed by the record herein, to require appellant to now pay, for the service it contracted for, more than it contracted to pay, would indeed be the taking of its property without justification of law, and without due process of law.

C.

The Missouri legislature, by its Public Service Commission Law, did not authorize the abrogation of the contract in controversy.

Heating service and heating companies were, apparently, overlooked in the original draft of the "Public Service Commission Law." So, Section 105a was inserted at the end of Article V, which relates to telegraph and telephone corporations (Laws of Mo., 1913, p. 637; Sec. 5228, R. S. Mo., 1929, Vol. I, p. 1470) By that section all the provisions of the act relating to railroad, gas, electrical, water, telephone and tele-

graph companies, "so far as the same shall be practically, legally or necessarily applicable to heating companies in this state, *are hereby made applicable to such heating companies,* as designated in this act, and shall have *full application thereto*" (italics ours).

Turning to Section 87, Par. 4 of Article V of the Act (Laws, 1913, p. 621, Par. 4, Sec. 5208, R. S. Mo., 1929, Vol. I, p. 1459), relating to telegraph and telephone companies, which by Section 5228, above quoted, is expressly made applicable to heating companies, we find this provision:

> "Nothing in this act shall be construed to prevent any telegraph corporation or telephone corporation (or heating company) from continuing to furnish * * * service under any contract or contracts in force at the date *this article takes effect* or upon the *taking effect of any schedule or schedules of rates subsequently filed* with the commission, as hereinafter provided, *at the rates fixed in such contract or contracts*" (italics and matter in parenthesis supplied).

Thus, by virtue of the statute itself, plaintiff's claim fails, that it *must* charge defendant according to the filed schedule; that it was *prevented* by the statute from charging other than the rates named in the filed schedules. Note again the statute: "Nothing in this act shall be construed to prevent any (heating company) from continuing to furnish * * * service * * * at the rate or rates fixed in such contract or contracts." This provision of the act served to save and keep in effect heating contracts which were in effect

when the act was passed, or which were in effect when a schedule of rates was filed or issued. It certainly did so in the absence of a finding and order of the commission, upon a hearing, that appellee should, for the public interest, desist from performing the contract.

The state asserts and exercises rights under its police power solely through its legislature. The state *always* had the *right* to exercise its police power with respect to matters affected by the Public Service Commission Act. But if never exercised such power until the legislature spoke. The state could exercise the powers which it had, in such matter, at great length or in a limited way, in the judgment and discretion of the legislature. And, if the legislature saw fit to have the statute not apply to heating service under a contract "in force at the date this article takes effect or upon the taking effect of any schedule of rates subsequently filed," it was within the province of the legislature so to provide. And the legislature did do so here in very plain language.

That provision of the statute, which preserved defendant's existing contract for heat service, is applicable to the issues both upon counts one to five and upon counts six to eleven of the petition herein.

This court upheld and gave effect to a somewhat similar provision of the statutes of Arkansas, which empowered the railroad commission to fix and regulate public utility rates, but provided that the commission,

"shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms," etc.

Arkansas Nat. Gas Co. v. *Ark. Rd. Comm.*, 261 U. S. 379; 67 L. Ed. 705.

The Missouri Supreme Court does not, in its opinion herein, question but that Paragraph 4, Section 5208, above quoted, which preserved existing contracts, was "practically, legally or necessarily applicable to heating companies" (to quote from Section 5228, *supra*). That Honorable Court, after citing several of its former decisions which hold, so it says, that, upon the passage of the Public Service Commission Law, all contracts, as to rates, with public utility companies, expired, *ipso facto*, disposed of appellant's contention, that said Section 5208 preserved, inviolate, its contract, thus:

"So, in the light of our decisions, *supra*, we have no hesitancy in reaffirming that the statute purporting to preserve existing contracts does not operate to exempt such contracts from the scope of the exercise of the police power of the state to protect or promote the general or public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates" (93 S. W. (2d) l. c. 959, Rec. 11).

The court speaks of "*reaffirming* that the statute purporting to preserve existing contracts does not operate," etc., although, as a matter of fact, said Section 5208, and its effect, had not been considered or referred to in any prior decision of that court. It will be noted that the court does not question but that the "purport" of the statute was "to preserve existing contracts." Just

why the court concludes that the statute does not do what it purports to do, that is, what it was intended by the legislature to do, we are not able to discover from the court's language. The court recognizes the clear meaning of what the legislature said, but we infer that the court feels that the legislature ought not to have said it. The court seems to think that the legislature, by said Section 5208, had somewhat abridged the police power of the state, that is, had failed to exercise the police power to its fullest possible extent. However, there can be no question but that it was for the legislature and not the court to determine the extent to which the police power of the state should be exercised. If the legislature saw fit to "preserve existing contracts," which the court says was the purport of the statute, such was within the rightful and exclusive province of the legislature.

Farmers & M. Bk. v. *Fed. Reserve Bk.*, 262 U. S. 649.

Central Lumber Co. v. *So. Dakota*, 226 U. S. 157.

Lindsley v. *Nat. Carbonic Gas Co.*, 220 U. S. 61.

It is admitted that appellant paid all that it was required by the contract to pay for the heat service rendered (Rec. 41, 47). It is plain, therefore, that appellant may not rightfully be required to pay more for said service unless the contract was abrogated. If the contract was not annulled, then the judgment of the Missouri Supreme Court that appellant pay a sum in excess of the contract price, for the service rendered pursuant to the contract, deprives appellant of its property without giving to it anything in return. And, for the state to take

appellant's property without compensation is to deprive it thereof without due process of law. In *Holden* v. *Hardy*, 169 U. S. 366, this court said:

> "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation."

The state may violate the Fourteenth Amendment to the Federal Constitution through the agency of a court, as well as through the agency of its legislature.

C., B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

In the case just cited, this court said:

> "It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the 14th Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' *Ex parte Virginia*,

100 U. S. 339, 346, 347 (25: 676, 679); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Gibson* v. *Mississippi*, 162 U. S. 579 (40: 1078). These principles were enforced in the recent case of *Scott* v. *McNeal*, 154 U. S. 34 (38: 896), in which it was held that the prohibitions of the 14th Amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th Amendment."

If it be urged that the Missouri Supreme Court did not take appellant's vested rights in this contract "without due process of law," because appellant had a hearing, in due course, in that court, in the case at bar, the answers are several. First, the question as to whether or not this contract should be abrogated, that is, whether or not appellee should be relieved from its performance, in the interest of the public weal, was not made an issue and could not have been made an issue in this case. It was not a judicial question. Second, the contract had been fully performed when this suit was instituted, and whether or not it ought to be performed had become a mere moot question. Neither court, commission nor legislature could abrogate the contract, that is, relieve appellee from performing it, after it had been performed, and had expired. Third, merely because the Missouri Supreme Court went through the regular form of a trial or hearing of this case it does not follow that it did not, by its judgment, deprive appellant of its property without due process

of law. On that proposition this court, in the case last above cited, ruled thus:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank,* 92 U. S. 542, 554 (23: 588, 592); *Leeper* v. *Texas,* 139 U. S. 462, 468 (35: 225, 227). But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. * * * If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment."

Missouri Cases Considered.

The Supreme Court of Missouri rules the instant case upon the authority of certain of its previous decisions which are said to declare that, upon the enactment of the Public Service Commission Law, all private contracts for utility rates became, *ipso facto,* null and void. The court failed to note that in each of the cases cited, with possibly one exception, where a contract was involved, the matter of the contract, and its performance, had come, first, before the public service commission, where, with the affected parties present, there had been a hearing and a finding with respect to the contract. The cases referred to are: *State ex rel. Sedalia* v. *P. S. C.,* 275 Mo. 201; *City of Fulton* v. *P. S. C.,* 275 Mo. 67; *State ex rel. Washington Univ.* v. *P. S. C.,* 308 Mo. 328. Our chief cause of complaint here is the absence of the essential things which were present in the cases cited, to-wit, a hearing, on notice, and a finding by the commission with respect to the contract. The possible exception noted is that of the case of *K. C. Bolt & Nut Co.* v. *K. C. L. & P. Co.,* 275 Mo. 529. That case was affirmed, on appeal, by this court: 252 U. S. 571. In that case, however, the sole contention urged by plaintiff (appellant) was that the state did not have the right and power to abrogate a contract which was entered into prior to the passage of the Public Service Commission Law. No such contention is made in the case at bar. In said Bolt & Nut Co. case no complaint was made on the ground that there had been no hearing or finding by the commission, and, apparently, there had been a proper hearing and finding by the public

service commission, for the Missouri Supreme Court, on page 532 of its opinion, says:

> "On April 17, 1917, the public service commission, proceeding in conformity with the provisions of the Public Service Commission Act, after a valuation was made and *full hearing had*, made an order establishing a schedule of rates which the defendant company should be permitted to charge for electric energy at Kansas City, Missouri" (italics ours).

It thus appears that the previous Missouri cases, cited in the instant case, are not pertinent to the propositions here raised. In any event, they are not controlling upon this court in so far as they affect questions arising under the Federal Constitution.

Conclusion.

The case boils down to this. The Missouri Supreme Court could not, in the case at bar, abrogate the contract in controversy. The legislature did not itself directly abrogate the contract, by the utility act. If the legislature, by reason of the saving clause of Section 5208, above mentioned, preserved this contract and did not authorize its abrogation, by virtue of the Public Service Commission Law, then the contract remained in full force, throughout its term, and the judgment of the court that appellant pay more than was required by contract deprives appellant of its property without compensation, *i. e.*, without due process of law. Even if said Section 5208 did not save the contract from being abrogated under the provisions of the Public Service Commission Law, it remained in force until abrogated by due process of law, that is, by an orderly procedure before the Public Service Com-

mission. There could be no such procedure, absent a hearing, after notice to appellant, and a finding by the commission that the performance of the contract would be *detrimental to the public interest.* If, as this Honorable Court says, the intervention of the public interest alone justifies and also conditions the exercise of the police power toward the abrogation of a contract, the fact of the intervention of the public interest must, assuredly, be established by a finding of competent authority, viz., by the commission, before the contract could be lawfully or effectually abrogated. The contract in controversy was performed, and there was never any lawful finding that the public weal would or did suffer thereby.

For each and all of the reasons above stated the judgment of the Honorable Supreme Court of Missouri, both upon the first five counts and upon the last six counts of the petition, should be reversed.

Respectfully submitted,

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